STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANSLEY HARRIS,

Defendant-Appellant.

UNPUBLISHED
September 25, 2003

No. 237178
Wayne Circuit Court
LC No. 00-011045-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY D. WILLIAMS,

Defendant-Appellant.

No. 237193
Wayne Circuit Court
LC No. 01-011045-02

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendants Ansley Harris and Larry Williams were tried jointly, before separate juries. Defendant Harris was convicted of voluntary manslaughter, MCL 750.321, armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to five to fifteen years' imprisonment for the manslaughter conviction, and eighteen to thirty-five years' imprisonment each for the armed robbery and assault with intent to rob while armed convictions, to be served concurrently, but consecutive to two years' imprisonment for the felony-firearm conviction. Defendant Williams was convicted of involuntary manslaughter, MCL 750.321, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, assault with intent to rob while armed, and accessory after the fact, MCL 750.505. He was sentenced to concurrent terms of six to fifteen years' imprisonment for the manslaughter conviction, twelve to twenty-five years' imprisonment each for the conspiracy and assault with intent to rob while armed convictions, and two to five years' imprisonment for the accessory after the fact conviction. Defendant Harris appeals as of right in Docket No. 237178, and defendant Williams appeals as of right in Docket

No. 237193. We affirm defendant Harris' convictions and sentences; we vacate defendant Williams' conviction and sentence for accessory after the fact, affirm his remaining convictions and sentences, and remand for the limited purpose of correcting the judgment of sentence.

Defendants' convictions arise from allegations that, in the early morning of August 29, 2000, defendants and a third man set out to commit a robbery and then subsequently, at approximately 4:00 a.m., defendant Harris assaulted, robbed, and shot the victim at a Detroit doughnut shop, with the assistance of defendant Williams.

I. Issues raised by Defendant Harris in Docket No. 237178

A. Jury Instructions

Defendant Harris first argues that he was denied a fair trial because of several instructional errors. The record reflects defense counsel's on-the-record expression of satisfaction with the trial court's instructions and the jury verdict form. Counsel's affirmative approval of the trial court's jury instructions waived any error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Consequently, reversal is not warranted on this basis. *Carter, supra* at 219-220.

Furthermore, even if we were to review the instructional issues as unpreserved claims subject to forfeiture, rather than issues that have been waived, appellate relief still would not be warranted. Because defendant Harris failed to challenge the court's jury instructions, review of these claims would be limited to plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant Harris first claims that trial court erroneously forced the jurors into rendering a guilty or not guilty verdict by failing to instruct them that they had an option to disagree and return "no verdict." Whether a trial court improperly foreclosed jurors from not reaching a verdict depends on the coercive nature of the instructions. *People v Pollick*, 448 Mich 376, 384; 531 NW2d 159 (1995). In other words, the instructions must not have caused a juror to abandon his or her conscientious opinion and defer to the decision of the majority solely for the sake of reaching a unanimous verdict. *Id*.

Here, viewed in their entirety,[1] the trial court's instructions did not unduly coerce the jurors into reaching a verdict. Rather, the instructions properly reflected the applicable law, including that the jury's verdict must be unanimous, and that each juror should vote their conscience and should not give up their honest opinions just for the sake of reaching a unanimous verdict. See *People v Burden*, 395 Mich 462, 468-469; 236 NW2d 505 (1975). The jury was also properly instructed that, if they agreed, they could find defendant either guilty or not guilty of the charged offenses. See *People v Traylor*, 100 Mich App 248, 251; 298 NW2d

[1] In presenting this issue, defendant relies on excerpts of the trial court's instructions to argue that the instructions were coercive, without presenting the entirety of the court's instructions. In reviewing this issue, however, the court's instructions should not be taken out of context. Rather, the instructions must be reviewed as a whole. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

719 (1980). Further, the challenged instructions were given before deliberations began and not in response to an already deadlocked jury. See *Pollick, supra* at 385 ("there is a greater coercive potential when [a unanimity] instruction is given to a jury that already believes itself deadlocked" than when it is given before the start of deliberations). Additionally, the trial court's instructions were virtually identical to CJI2d 3.11 and CJI2d 3.20 of the standard jury instructions. Although the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), they are useful in evaluating the propriety of the instructions given. In sum, because the challenged instructions were legally accurate and adequately protected defendant's rights, this issue would not warrant reversal, even if it was not waived.

Defendant Harris also claims that the trial court's use of the word "satisfied" in the following instruction was erroneous:

> A person accused of crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are *satisfied* beyond a reasonable doubt that the defendant is guilty. [Emphasis added.]

However, this jury instruction followed verbatim the instruction provided by CJI2d 3.2. This Court has held that an instruction based on CJI2d 3.2 adequately defines the concept of reasonable doubt in the context of the jury's role as factfinder. See *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999), and *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 593 (1996). Accordingly, even if this issue was not waived, it would not warrant reversal.

Defendant Harris further claims that the use of the phrase "should not" in the following jury instruction was prejudicial:

> The Prosecution has introduced evidence of a statement that it claims the defendant made. You cannot consider such an out-of-court statement as evidence against the defendant unless you do the following; First, you must find that the defendant actually made the statement as it was given to you. If you find that the defendant did not make the statement at all, you *should not* consider it. [Emphasis added.]

This instruction is analogous to CJI2d 4.1,[2] and accurately and adequately set forth the applicable law. Accordingly, even if not waived, this issue likewise would not warrant reversal.

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[2] At the time of defendant Harris' trial, CJI2d 4.1 provided, in pertinent part:

> (1) The prosecution has introduced evidence of a statement that it claims the defendant made. You cannot consider such an out-of-court statement as evidence against the defendant unless you do the following:

(continued…)

Defendant Harris' final instructional claim is that the trial court erred when it failed to instruct the jury that, in addition to being a defense to first-degree felony murder, accident was also a defense to voluntary manslaughter. Defendant Harris correctly asserts that accident is a defense to voluntary manslaughter. See *People v Hes*s, 214 Mich App 33, 38; 543 NW2d 332 (1995). In *People v Hess,* the trial court incorrectly instructed the jury that accident is not a defense to manslaughter. This Court held that "[b]ecause voluntary manslaughter requires proof of intent, the defense of accident is applicable and the trial court in this case committed error requiring reversal in instructing the jury that it was not." *Id*. However, *Hess* is distinguishable from the present case.

Here, the trial court did not specifically instruct the jury that accident is not a defense to manslaughter. The trial court instructed the jury with regard to first-degree felony murder, and immediately thereafter instructed the jury on the defense of accident to murder. Subsequently, the trial court instructed the jurors with regard to second-degree murder and then voluntary manslaughter, stating that the crime of "murder may be reduced to manslaughter if defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to clam down." Although the court did not separately instruct the jury that accident is also a defense to voluntary manslaughter, the court's instructions relative to murder specifically recognized defendant Harris' assertion that, if the shooting was accidental, he was not guilty. Even though the court did not specifically state that accident was also a complete defense to voluntary manslaughter, it did make clear that voluntary manslaughter was a lesser form of intentional homicide than second-degree murder, the distinction being that the perpetrator acted on provocation.[3] In sum, because the trial court's instructions, viewed in their entirety, covered the substance of the omitted instruction and adequately protected defendant Harris' rights, reversal would not be warranted even if this issue was not waived.

Moreover, at trial, defendant Harris' principal claim was that he was not the perpetrator of the offenses. Indeed, defendant Harris specifically rejected a jury instruction based on a "claim" that he accidentally shot Lewis. This is evidenced by defense counsel's request that the accident instruction be amended. CJI2d 7.1 provides in part that, "[t]he defendant says that he[] is not guilty [] because [the victim]'s death was accidental." Defense counsel stated the following in regard to the standard instruction.

> Your Honor, I prepared a second proposed 7.1. Unless the language of that jury instruction reads, there has been evidence that Delores Lewis' death was accidental, instead of the defendant says that he is not guilty because, we don't want that instruction. And I discussed this with my client.

(…continued)

> (2) First, you must find that the defendant actually made the statement as it was given to you. If you find that the defendant did not make the statement at all, you should not consider it. If you find that [he / she] made part of the statement, you may consider that part as evidence.

[3] Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool. *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993).

The trial court accepted defense counsel's proposed language and the jury was so instructed. Had defendant Harris been required to "claim" that the shooting was accidental, the record demonstrates that he would not have sought to raise the issue of accident. Accordingly, there is no manifest injustice as defendant Harris expressed that the omitted instruction did not pertain to a basic or controlling issue in this case. MCL 768.29; *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Accordingly, defendant has not show a plain error affecting his substantial rights resulting from the alleged omission of an accident instruction relative to voluntary manslaughter.

B. Ineffective Assistance of Counsel

Defendant Harris also argues that he is entitled to a new trial because defense counsel was ineffective for failing to challenge the trial court's instructions. We disagree.

Because defendant failed to make a testimonial record concerning this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

We reject defendant Harris' claims of ineffective assistance of counsel. As discussed in part (I)(A), *supra*, the trial court's instructions concerning unanimity of the verdict, consideration of defendant Harris' alleged statement, and reasonable doubt, were not improper and, thus, any objection would have been futile. Counsel is not required to make a frivolous objection, or advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Further, as indicated previously, although the trial court did not specifically state that accident was a complete defense to voluntary manslaughter in addition to murder, the court's instructions, viewed in their entirely, sufficiently covered the substance of the omitted instruction and adequately protected defendant's rights. In sum, defendant Harris has failed to demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*. Moreover, in regard to the accident instruction, it was previously mentioned that defendant Harris' central claim that he was not the perpetrator of the offense. Defendant Harris' central claim was inconsistent with a claim of an accidental shooting, and it is possible that defense counsel may have attempted to diminish the accident theory in requesting only one instruction on accident. Therefore, defendant Harris is not entitled to a new trial.

II. Issues raised by Defendant Williams in No. 237193

A. Accessory after the Fact

Defendant Williams first argues that, because he was convicted as a principal, his conviction and sentence for accessory after the fact must be vacated. We agree.

Because defendant Williams failed to raise this claim below, we review for plain error affecting defendant's substantial rights. *Carines*, *supra*. A person is an accessory after the fact when, after obtaining knowledge of the principal's guilt after the completion of the crime, he renders assistance in an effort to hinder the detection, arrest, trial, or punishment of the principal. *People v Beard*, 171 Mich App 538, 545; 431 NW2d 232 (1988). A defendant cannot be convicted as both a principal and an accessory after the fact with respect to the same crime. *People v Hartford*, 159 Mich App 295, 299; 406 NW2d 276 (1987). Here, in addition to his conviction for accessory after the fact, defendant Williams was also convicted as a principal for manslaughter, conspiracy to commit armed robbery, and assault with intent to rob while armed under an aiding and abetting theory. "The appropriate way to view a defendant who has helped both before and after a crime is as a principal." *Id*., at 301. Thus, defendant Williams' conviction as an accessory after the fact constitutes plain error. Further, because a conviction for accessory after the fact is not permitted in this circumstance, the error affected defendant Williams' substantial rights. Accordingly, we vacate defendant Williams' conviction and sentence for accessory after the fact.

B. Sufficiency of the Evidence

Defendant Williams next argues that there was no evidence of an agreement between him and defendant Harris to commit a robbery and, therefore, the evidence was insufficient to sustain his conviction for conspiracy to commit armed robbery. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id*., at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). A conspiracy is a voluntary, express or implied mutual agreement or understanding between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. *People v Blume*, 443 Mich 476, 481, 485; 505 NW2d 843 (1993); *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). To prove the intent to combine with others for an unlawful purpose, it must be shown that the intent, including knowledge, was possessed by more than one person. *Blume, supra* at 482. For intent to exist, the defendant must know of the conspiracy, know of the objective of the conspiracy, and intend to participate cooperatively to further that objective. *Id*. at 485. Identifying the participants of an unlawful agreement is often difficult because of the clandestine nature of criminal conspiracies. Therefore, direct proof of a conspiracy is not

essential; rather, proof may be derived from the circumstances, acts, and conduct of the parties, and inferences may be made because such evidence sheds light on the coconspirators' intentions. *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997); *Cotton*, *supra*.

Here, the evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to conclude that defendant Williams conspired with defendant Harris to commit the crime of armed robbery. There was evidence that, shortly before the robbery, defendant Williams, defendant Harris, and a third man visited Corey Butler in an apartment. During the visit, Butler heard defendant Harris say that "they was going to hit a lick," which meant, "they was going to rob somebody." Shortly thereafter, defendant Williams left the apartment with defendant Harris and the third man. Defendant Williams admitted that, after they left the apartment, he gave defendant Harris a gun. The evidence showed that the three men collectively reached the location where the victim was ultimately robbed and shot by defendant Harris with the gun supplied to him by defendant Williams. There was also evidence that, while defendant Harris was attacking the victim, two other men were "within arm's length," "standing right directly beside [defendant Harris]."

Considering defendant Williams' conduct of leaving the apartment with the two men, giving a gun to defendant Harris, and proceeding to the ultimate location of the crime with the two men, the jury could reasonably infer that defendant Williams had knowledge of the conspiracy, and intended to participate in furtherance of the intended objective, i.e., the commission of a robbery. Although defendant Williams asserts that he gave defendant Harris his gun to distance himself from the intended robbery, the jury was entitled to accept or reject any of the evidence presented, including defendant's explanation regarding his alleged intent. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant Williams' conviction of conspiracy to commit armed robbery.

Defendant Williams' final claim is that, because there was no evidence that he knew of defendant Harris' intent or that he agreed to participate in an assault or manslaughter, the evidence was insufficient to sustain his convictions for involuntary manslaughter and assault with intent to rob while armed. We disagree.

Defendant Williams was convicted, under an aiding a and abetting theory, of involuntary manslaughter and assault with intent to commit armed robbery. The elements of involuntary manslaughter are (1) acting in a grossly negligent, wanton or reckless manner, (2) so as to cause the death of another. *People v Moseler*, 202 Mich App 296, 298; 508 NW2d 192 (1993). The elements of assault with intent to rob while armed are (1) an assault with force or violence, (2) an intent to rob, and (3) the defendant being armed. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986).

Defendant Williams does not specifically challenge the individual elements of the offenses. Rather, he alleges that there was insufficient evidence that he aided and abetted defendant Harris in the commission of the crimes. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant

performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001) (citation omitted).

"Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Carines*, *supra* at 757; *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). Further, an aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines, supra* at 758. However, a defendant's mere presence at a crime, even with knowledge that the offense is about to be committed, is not enough to make him an aider and abettor. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Here, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude that defendant Williams aided and abetted in the crimes in light of his actions and association with defendant Harris. Specifically, the evidence showed that, on the day of the incident, defendant Williams was with defendant Harris when he stated that "they" were going to rob someone. Defendant Williams thereafter left the apartment with defendant Harris and a third man and walked to the ultimate location of the crimes. Defendant Williams admitted that, in the interim between leaving the apartment and reaching the location of the crimes, he gave defendant Harris the gun that he used to rob and kill the victim. Further, there was evidence that, while defendant Harris was attacking the victim, two men were "within arm's length," "standing right directly beside him." There was also evidence that, after the victim was assaulted and shot, defendant Williams and defendant Harris left the crime scene simultaneously, and returned to the apartment together. Also, defendant Williams admitted that, after the incidents, he took and housed the gun.

Defendant Williams' conduct before, during, and after the incident was sufficient to enable the jury to find, beyond a reasonable doubt, that he assisted defendant Harris in the commission of the crimes with knowledge of defendant Harris' intent. Therefore, the evidence, viewed in a light most favorable to the prosecution, was sufficient to sustain defendant Williams' convictions for involuntary manslaughter and assault.

In Docket No. 237178, we affirm.

In Docket No. 237193, we affirm in part, vacate defendant Williams' conviction and sentence for accessory after the fact, and remand for the limited purpose of correcting defendant Williams' judgment of sentence. We do not retain jurisdiction.

/s/ Judge William C. Whitbeck
/s/ Judge Michael J. Talbot
/s/ Judge Brian K. Zahra